

## Treasury Department Issues CISADA Implementing Regulations Regarding Financial Institutions and Activities

August 26, 2010

On August 16, 2010 (approximately 45 days before they were required to be issued), the Treasury Department's Office of Foreign Assets Control ("OFAC") published regulations implementing certain banking and financial sanctions provisions of the Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA"), 75 Fed. Reg. 49836 (2010). The regulations issued are final and went into effect immediately, although OFAC is accepting comments on the regulations through October 15, 2010.

The "Iranian Financial Sanctions Regulations" ("IFSRs") implement provisions of section 104 of CISADA that require (i) restrictions on US correspondent and payable-through accounts of foreign financial institutions that are involved in certain Iran-related activities, and (ii) sanctions on US entities that own or control entities engaged in transactions with Iran's Islamic Revolutionary Guard Corps ("IRGC") (see our previous Client Alert [here](#)). CISADA required the Treasury Secretary to issue regulations implementing these prohibitions within 90 days of the date of enactment (July 1, 2010), and the IFSRs fulfill this requirement.

The IFSRs implement this narrow portion of CISADA and do not deal with other provisions of the law, including CISADA provisions that amend the Iran Sanctions Act to make sanctionable certain activities related to Iranian imports/production of refined petroleum products. We will update you further as other provisions of CISADA are implemented.

### ***Correspondent and Payable-Through Accounts***

The IFSRs require the Treasury Department to either prohibit or place "strict conditions" on establishment of correspondent or payable-through accounts in the United States of a foreign financial institution that knowingly (including both actual knowledge and reason to know):

- (1) facilitates the efforts of the Government of Iran (including the IRGC or their agents or affiliates) to acquire WMD or delivery systems for the same, or provides support for a Foreign Terrorist Organization;

- (2) facilitates the activities of a blocked person under UN Security Council resolutions involving Iran;
- (3) engages in money laundering to carry out an activity under (1) or (2);
- (4) facilitates efforts by the Central Bank of Iran to carry out an activity under (1) or (2); or
- (5) facilitates a significant transaction(s) or provides significant financial services for the IRGC or any of its blocked/sanctioned agents or affiliates, or a financial institution whose property or interests in property are blocked in connection with Iran's proliferation of WMD or delivery systems for same, or Iran's support for international terrorism. (In this regard, see <http://www.ustreas.gov/offices/enforcement/ofac/actions/20100816.shtml>.)

If the Treasury Department finds that a foreign financial institution is engaged in such activities, it has two options. First, it may categorically forbid a US financial institution to open or maintain a correspondent or payable-through account for such foreign institution. Alternatively, the Treasury Department may impose, by order or by rule, "strict conditions" on opening or maintaining such accounts. While CISADA does not define such "strict conditions," the regulations specify that that such conditions may include (but are not limited to):

- (1) prohibiting the provision of trade finance through such accounts;
- (2) restricting the types of transactions that may be processed through such accounts (such as limiting them to personal remittances);
- (3) placing monetary limits on transactions that may be processed through such accounts; or
- (4) requiring pre-approval from the US financial institution for all transactions.

The IFSRs define both "foreign financial institution" and "US financial institution," as entities "engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent." Each definition is then followed by a list of specific types of such

institutions (principally banks and related types of entities), but each list is preceded by a *caveat* that the definition is not limited to such institutions. While the list of institutions in each definition is very similar, the list under "US financial institution" includes "insurance companies," whereas the list under "foreign financial institution" does not do so.

The IFSRs include "interpretations" that give further guidance regarding the regulations' prohibitions and restrictions. For example, they elucidate what it means for a foreign financial institution to "facilitate" an activity/transaction, and, for purposes of transactions with the IRGC, how one is to determine whether a transaction is "significant."

For "facilitation," the regulations cast a wide net, providing that a foreign financial institution facilitates an activity/transaction through "the provision of currency, financial instruments, securities, or any other transmission of value; purchasing; selling; transporting; swapping; brokering; financing; approving; guaranteeing; or the provision of other services of any kind; or the provision of personnel; or the provision of software, technology, or goods of any kind."

As to determining whether a transaction is "significant," the regulations establish that this assessment will be made based on a "totality of the circumstances," but identifies certain factors that OFAC is likely to consider:

- (1) the size, number and frequency of the transaction/financial services;
- (2) the nature of the transaction/financial services, such as type, complexity and commercial purpose;
- (3) the level of awareness of the institution, and whether it is a pattern of conduct;
- (4) the proximity (nexus) between the institution and the IRGC/affiliate;
- (5) the impact of the transaction/financial services upon the objectives of CISADA; and
- (6) whether there are any attempts to obscure or conceal the parties or the true nature of the transaction.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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## ***Foreign Subsidiaries***

The rule directs foreign subsidiaries of US financial institutions not to engage in transactions with or benefiting the IRGC or any of its blocked/sanctioned agents or affiliates. In this regard, see <http://www.ustreas.gov/offices/enforcement/ofac/actions/20100816.shtml>. Civil penalties may be imposed against the foreign subsidiary's US parent if the subsidiary engaged in the prohibited activity and the parent knew or should have known of the subsidiary's action.

## ***Penalties***

Civil penalties for violations of the regulations are those set forth in the International Emergency Economic Powers Act ("IEEPA") -- the greater of \$250,000, or twice the value of the transaction. For willful violations, criminal penalties of \$1 million and/or 20 years imprisonment may be imposed.

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